

90-876

Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1990

ROLANDO THOMAS ALAYON,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF MINNESOTA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Does *Maryland v. Buie*, 110 S.Ct. 1093 (1990), permit a protective sweep to prevent the destruction of evidence, as opposed to a sweep for the purpose of safety?

II.

Under *Buie*, does the Fourth Amendment require both probable cause to arrest, and a reasonable belief that danger exists as prerequisites to conducting a protective sweep of a citizen's home?

III.

Does *Segura v. United States*, 468 U.S. 128 (1984) Require a factual finding that the officers were actually in the process of obtaining a warrant before a protective sweep is permissible under the Fourth Amendment?

IV.

Absent a warrant or probable cause, does the Fourth Amendment as interpreted in *Payton v. New York*, 445 U.S. 573 (1980), *United States v. Santana* 427 U.S. 38 (1976), and *Terry v. Ohio*, 392 U.S. 1 (1968) permit the seizure, at gunpoint, of a citizen who answers a knock at his door?

V.

Where consent to search is obtained immediately after an illegal arrest and detention and without benefit of *Miranda* warnings is such consent knowingly and voluntarily given?

THE HISTORY OF THE

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**PETITION FOR WRIT OF CERTIORARI
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FOR THE STATE OF MINNESOTA**

Petitioner prays that a writ of certiorari issue to review the judgment of the Minnesota Supreme Court, entered in the above-entitled case on August 10, 1990; the Order denying Petition for Rehearing was filed on September 12, 1990.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals reversing the trial Court is reported at 454 N.W.2d 629. The opinion of the Minnesota Supreme Court reversing the Appellate Court is reported at 459 N.W.2d 325.

JURISDICTION

The Judgment of the Minnesota Supreme court was dated and filed August 10, 1990. An Order of the Supreme Court of Minnesota denying rehearing was filed on September 12, 1990. Jurisdiction is based upon 28 USC § 1257 and United States Supreme Court Rule 20.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following portions of the Fourth Amendment to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,"

STATEMENT OF 'THE CASE

On March 29, 1989, acting in an undercover capacity, Sergeant Francis Zaruba, a St. Paul Police Officer, arranged to purchase an "eight ball" (3.5 grams) of cocaine. Pursuant to prior arrangements, Zaruba met two individuals (later identified as Merle Jones and Rolando Espinoza) in the parking lot at Awada's Restaurant. After negotiating the deal, Zaruba waited at Awada's parking lot while the two individuals purportedly went to obtain the cocaine. Surveillance officers followed the individuals, who were driving a Ford LTD, to the area of E. King, approximately one mile away from the Awada's parking lot on the West side of St. Paul. The LTD was observed to pull up in front of 83 or 81 E. King, the passenger exited the vehicle and he returned a short time later; surveillance did not see where he went. The individuals then returned to Awada's parking lot and delivered the cocaine to Zaruba and received from him the sum of \$235.00. After the transaction on March 29, 1989, the LTD was followed but did not return to the vicinity of E. King.

On March 30, 1989, Zaruba again spoke with Jones, who agreed to sell an ounce of cocaine for \$1,500.00. Zaruba met with Jones and Espinoza in Awada's parking lot on March 30, 1989; they were riding in the same Ford LTD. Zaruba agreed to follow Jones to the intersection of Stevens and Livingston; both vehicles parked on Stevens, just South of Livingston. Zaruba observed Espinoza to exit Jones' vehicle and proceed South on Livingston and then East on King until Espinoza was out of Zaruba's line of vision. Although Espinoza was walking in the direction of 81 or 83 E. King, Zaruba could not see either residence from his vantage point. Espinoza returned approximately five minutes later and delivered something to Jones. After receiving a package of cocaine from Jones, Sgt. Zaruba gave a prearranged signal to surveillance officers resulting in the arrest of Jones and Espinoza. Zaruba assumed that Jones went into either the house at 81 E. King or 83 E. King and, based upon that, concluded that the drugs came from one of those houses. As Zaruba indicated, however, most of the houses

on the block were white, and that from the surveillance location, it could not be determined whether Espinoza went into a house on the North or South side of King, and that there were a number of houses on both sides of the street.

After the arrest of Jones and Espinoza, St. Paul Police Sgt. Neil Nelson went to 81 E. King because surveillance officer Carter gave that address as his "best guess at to where Espinoza went. Nelson was "hoping" to find something at 81 E. King.

Nelson took the "buy" money and went to the residence at 81 E. King where he proceeded to knock on the door. A Latin male, later identified as defendant Alayon, answered the door. Nelson waived money in front of Alayon claiming to have received it from "Jose". Alayon proceeded to hold open the outer door with one hand and the inner door with the other. At no time did Alayon say anything to Nelson, attempt to take money, or make any response other than a nod of his head. Nelson did not want him to close the door and prevented him from closing it. When Alayon started to close the door Nelson pulled his gun and told him to lie on the floor. He ended up part way in and part way outside the house. Nelson wanted Alayon to remain until he completed his investigation.

Prior to approaching 81 E. King, rather than attempting to obtain a warrant, Nelson called back-up officers so they would be ready to go into the house. The officers had guns out when entering the residence. Nelson, still holding his gun, ordered two females inside the residence to remain seated. Approximately fifteen (15) seconds later, four or five additional officers, several of whom or all of whom had their guns drawn, entered the premises. Nelson asked Alayon for his consent to search prior to reading Alayon his *Miranda* rights. After finding cocaine, a scale, an unloaded .22 rifle and Alayon's identification, Nelson read the *Miranda* rights Alayon admitted possessing the cocaine.

When Zaruba went to interview Alayon several hours later at the Public Safety Building, Alayon refused to speak without an attorney present.

Alayon was convicted at a bench trial. A panel of the

Minnesota Court of Appeals reversed the conviction on the grounds that the evidence obtained in violation of the Fourth Amendment. The Minnesota Supreme Court reversed holding that the officer's actions were proper. Alayon, who was sentenced to 21 months in prison, has remained free on bail pending the conclusion of the appellate process.

REASONS FOR GRANTING THE WRIT

A panel of the Minnesota Court of Appeals held that the warrantless entry into Petitioner's home was not justified by probable cause or exigent circumstances and that Petitioner's consent to search was not voluntary as it was the result of his arrest without probable cause. The Minnesota Supreme Court reversed holding that Petitioner was not arrested but merely detained in a "public place" i.e., the doorway of this home — while five (5) armed police officers conducted a "sweep search" to prevent the destruction of evidence. In the Minnesota Supreme Court's view, the actions of the police did not violate the Fourth Amendment to the United States Constitution.

The Supreme Court of Minnesota has misconstrued the meaning of the Fourth Amendment as expressed by this Court.

The Minnesota Supreme Court has engaged in a grave misapplication of the prior decisions of this Court in holding that Petitioner was in a "public place" when, upon answering a knock on the door to his home, he was forcibly detained at gunpoint while numerous armed officers burst into his home; and in determining that it need not decide whether the officers has probable cause to arrest Petitioner. This opinion has totally ignored the facts in *United States v. Santana*, 427 US 38 (1976); *United States v. Watson*, 423 US 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); *Payton v. New York*, 445 US 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); and *Wolf v. Colorado*, 338 US 25, 69 S.Ct. 1359, 93 L.Ed.2d 1782.

The Minnesota Supreme Court has unconstitutionally extended this Court's decision in *Maryland v. Buie*, 100 S.Ct. 1093 (1990), by holding that a protective sweep of the premises was permissible absent probable cause to arrest *and* reasonable belief that danger to persons existed.

In *Buie* the police had an arrest warrant for a man suspected of committing armed robbery that same day. Moreover, the "sweep" was justified to prevent danger to the officers or others, not to prevent the destruction of evidence. The police here never attempted to obtain a

warrant, and the "exigent circumstances" were created by the actions of the police, not the suspect.

In *Santana*, the woman retreated into her doorway when she saw the police who had probable cause to arrest her because the person who had just sold cocaine to the police led them to her. "We thus conclude that a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under *Watson*, by the expedient of escaping to a private place" 427 US at 43.

As this Court stated in *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, pet. for rehearing den., 448 U.S. 908, 100 S.Ct. 3051 (1980):

... a person has been 'seized' withing the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, should be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. See *Terry v. Ohio*, supra, 392 U.S. at 19, n. 16, 88 S.Ct., at 1879, n. 16; *Dunaway v. New York*, 442 U.S. 200, 207, and n. 6, 99 S.Ct. 2248 2253, 60 L.Ed.2d 824; 3 W. LaFave, Search and Seizure 53-55 (1978). 446 U.S. at 554-55, 100 S.Ct. at 1877.

Based upon the foregoing analysis, it is clear that an arrest occurred when Nelson pulled his gun and ordered Alayon to the floor. The absence of formal language is not controlling, nor is Nelson's conclusion that Alayon was not arrested until later. *Dunaway*, 442 U.S. 200, 207, n.6, 99 S.Ct. 2248, 2253-54, n.6, 60 L.Ed.2d 824 (1979); *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 2640, 2640 (1979).

Absent probable cause, the police cannot seek to verify their suspicions by arresting the suspect. *Florida v. Royer*,

460 U.S. 491, 499, 103 S.Ct. 1319, 1325, 75 L.Ed.2d (1983).

The issue is not whether the officers subjectively felt they had probable cause, but whether they had objective probable cause. *Scott v. United States*, 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978).

Although the Fourth Amendment does not prohibit the temporary seizure of premises or property pending a warrant, such seizure must be supported by probable cause. *Segura v. United States*, 468 U.S. 796, 808-810, 104 S.Ct. 3380, 3387-3388, 42 L.Ed.2d 599 (1984). Here, the officers made no attempt to obtain a warrant. Instead of calling for a warrant, Sergeant Nelson called for a back-up team to assist in breaking into Alayon's home.

The warrantless, nonconsensual intrusion into one's home is presumptively unreasonable and the State bears a "heavy burden" to establish exigent circumstances. *Welsh v. Wisconsin*, 466 U.S. 740, 749, 104 S.Ct. 2091, 2097 (1984).

As stated long ago in *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed.2d 436:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

In *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), the Supreme Court held that, absent probable cause and exigent circumstances, warrantless arrests in the home are prohibited by the Fourth Amendment:

As the Court reiterated just a few years ago, the 'physical entry of the home is chief evil against which the wording of the Fourth Amendment is directed. (Citations omitted)' *Id.* at 585-86, 100 S.Ct. at 1379-80.

In *Bumper v. North Carolina*, 391 U.S. 543, 548-549, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), the court held that the state must prove that consent was freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. Where there is coercion there cannot be consent.

"In order for a consent to search to be valid, the state must establish that the decision to consent was made freely and voluntarily. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct. 2041, 2045, 36 L.Ed.2d 854 (1973). Whether consent was voluntary, and not the result of duress or coercion, is to be determined from the totality of circumstances, and while the subject's right to refuse is a factor to be taken into account, the prosecution need not demonstrate such knowledge as a prerequisite to establishing voluntary consent." 93 S.Ct. at 2059.

Consent which is closely attenuated to the illegal arrest is fruit of the poisonous tree under *Wong Sun v. United States*, 371 U.S. 471 (1963).

The taint of the prior illegal arrest cannot be purged merely by giving *Miranda* warnings.

If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by

making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words.' *Brown v. Illinois*, 442 U.S. 590, 602-3, 95 S.Ct. 2254, 2261-2262, 442 U.S., at 602-603, 95 S.Ct., at 2261-2262 (citation and footnote omitted).

The statements made by Alayon were clearly the product of his illegal arrest.

Nor has the state sustained its burden of proving that the statement was voluntarily given or that Alayon knowingly waived his *Miranda* rights. The purported waiver was clearly the product of coercion. *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963); see *Townsend v. Sain*, 372 U.S. 293, 307 (1963); *Columbe v. Connecticut*, 367 U.S. 568, 602 (1961); *Stein v. New York*, 346 U.S. 156, 185 (1953); *Mincey v. Arizona*, 437 U.S. 385, 399-401 (1978); *Davis v. North Carolina*, 384 U.S. 737, 752 (1966). The written waiver form was signed at the police station, after which Alayon exercised his right to counsel. These circumstances certainly bring into question the adequacy of Sergeant Nelson's "paraphrasing" the *Miranda* rights.

CONCLUSION

The well reasoned opinion of the Minnesota Court of Appeals holding that the warrantless entry into Petitioner's home was not justified by probable cause or exigent circumstances; and that Petitioner's consent to search was tainted by, and a direct result of, his illegal arrest is in accord with the prior decisions of this Court. The opinion by the Minnesota Supreme Court, however, extends the limited of Governmental authority beyond the boundaries imposed by this Court.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

Appendix A:

Opinion of the Minnesota Court of Appeals

Appendix B:

Opinion of the Minnesota Supreme Court

Appendix C:

Order of the Minnesota Supreme Court



APPENDIX A

State of Minnesota In Court of Appeals

C5-89-1768

Ramsey County

Parker, Judge

State of Minnesota,
Respondent,

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OFFICE OF APPELLATE COURTS

SYLLABUS

1. Warrantless entry into a house was not justified by probable cause or exigent circumstances.

2. Consent to search of a home which was given after an arrest without probable cause and after police officers conducted a sweep of the house with drawn guns was not voluntary.

Reversed.

Considered and decided by Lansing, Presiding Judge, Parker, Judge, and Randall, Judge.

OPINION

PARKER, Judge

Appellant Rolando Alayon was charged with distribution of cocaine, two counts of failure to affix tax stamps, and possession of cocaine with intent to distribute. As the *Rasmussen* hearing the trial court found that the warrantless entry into the house was based upon probable cause and exigent circumstances. The trial court also determined that Alayon had voluntarily consented to a search of the premises. On August 16, 1989, the trial court adjudicated Alayon guilty of the charged offenses. Alayon argues on appeal that the trial court erred by not suppressing evidence found in the warrantless search. We reverse.

FACTS

On March 29, 1989, Sergeant Frank Zaruba arranged through an informant for the purchase of 3.5 grams of cocaine. Zaruba drove to the parking lot of a restaurant and met Merle Jones and Roland Espinosa. After negotiating the purchase, both Jones and Espinosa left to get the cocaine while Zaruba remained at the parking lot. Zaruba had not yet paid for the cocaine. Surveillance officers followed Jones and Espinosa and observed their vehicle park in front of 81 or 83 East King in St. Paul. The officers believed Espinosa entered one or the two residences. Approximately 20 minutes later, Espinosa

returned to the parking lot and exchanged the cocaine for the money. After the purchase, Espinosa and Jones did not return to the area of East King Street.

On March 30, 1989, Zaruba arranged for another purchase of cocaine. Zaruba met Jones and Espinosa in the same restaurant parking lot, where it was agreed that Zaruba would follow Jones and Espinosa to another location because Zaruba refused to pay for the cocaine sight unseen. The two vehicles parked in the area of Steven and Livingston. Espinosa began walking south on Livingston to King Street, turned on King Street and walked east toward 81 or 83 East King Street. Another surveillance officer, Michael Carter, observed Espinosa enter either 81 or 83 East King. Espinosa returned to his vehicle and gave something to Jones. Jones then came back to Zaruba's vehicle and gave him the cocaine. Both Espinosa and Jones were then arrested.

Because the money had not been exchanged, the officers believed the source would be expecting payment. At this point, Carter told Sergeant Neil Nelson that it was his "best guess" that the source of the cocaine was 81 East King. Carter did not actually see Espinosa enter the premises. Carter told Nelson that Espinosa went into a white house with an open porch and pillars. 81 East King has an open porch and pillars, while 83 East King does not. Additionally, Carter believed that if a door had opened at 83 East King, he would have observed it. He did not; therefore, the officers believed 81 East King to have been the source of the cocaine.

Nelson knocked on the door of 81 East King and appellant Alayon answered the door. Nelson testified he told Alayon the "Jose" had sent him up there with the money. At this point, Alayon frowned and glanced at the street. Sergeant Nelson then pulled out the money and told Alayon that Espinosa has gotten into a fight and that was why he was delivering the money. Alayon then nodded his head, but did not take the money or reply. During this encounter, the front door was partially open. Alayon began to close the front door and open the screen door at the same time. Nelson

testified he believed that because the door was being closed, there would no longer be an opportunity to "secure" or "protect" the premises, so he drew his gun and ordered Alayon to the floor. Nelson then stepped into the house and ordered two females, Miriam Montanez and Luz Cotto, to remain seated in the living rooms. Very shortly after Nelson's entry, other surveillance officers entered the house with guns drawn. A sweep of the house was performed to identify other occupants.

Nelson then asked Montanez if he could search the premises and Montanez orally agreed. Alayon also agreed to allow a search of the house and during the search was cooperative. Alayon was asked if cocaine was in the house and he responded that there was and showed them its location and a scale in a kitchen cabinet.

Alayon was then formally placed under arrest and given *Miranda* warnings. He acknowledged an understanding of the warnings and confessed to selling an ounce of cocaine earlier that day to Escobosa. A search performed incident to the formal arrest recovered \$1,493. Alayon confessed that this money has been obtained from the sale of drugs.

ISSUES

1. Was the warrantless search of a house supported by probable cause and exigent circumstances?
2. Was Alayon's consent to the search voluntarily given?

DISCUSSION

I.

A warrantless search of a house is constitutionally permissible if (1) there is probable cause for the search, and (2) there are exigent circumstances requiring immediate action. *State v. Mollberg*, 246 N.W.2d 463, 468 (Minn. 1976). The state initially argues that the officers needed only a reasonable suspicion of criminal activity in order to detain Alayon and seize the house pending a search warrant. We believe this to be an incorrect statement of the law applicable to the facts of this case. As the United States Supreme Court states, the "physical entry of the home is the chief evil

against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585-86 (1980) (citation omitted). The fourth amendment does not allow seizure of a house upon a showing of reasonable suspicion.

The state next argues that probable cause existed because of Alayon's actions at the door. We disagree. Carter testified it was his "best guess" that the source of the cocaine was 81 East King. To investigate further, Nelson attempted to deliver the money to pay for the drug purchase. Nelson's meeting at the front door with Alayon produced merely a frown, a glance and a nod; Alayon did not take the money. These equivocal actions will not support an objective determination that the occupants of 81 East King had additional evidence of the crime the officers were investigating. Moreover, the officers were already in possession of the cocaine.

The state argues that any delay in payment to Alayon would have alerted him to Espinosa's and Jones' arrest, that any evidence which might have been in the house would have been destroyed or removed, and that this constituted an exigency justifying a warrantless entry. We do not believe exigent circumstances were present. "Whether the exigencies of a situation are sufficient to allow a warrantless search depends upon the totality of the circumstances." *Mollberg*, 246 N.W.2d at 469. One federal court has defined "exigent circumstances" by enumerating six factors which must be met before exigency justifies a warrantless entry. *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970). In turn, the Minnesota Supreme Court has stated that the *Dorman* analysis should be used only as a guideline in determining whether exigent circumstances existed. *State v. Lohnes*, 344 N.W.2d 605, 611 (Minn. 1984). The *Lohnes* court listed the following six *Dorman* factors:

First, that a grave offense is involved, such as a crime of violence; second, that the suspect is believed to be armed; third, that there be a clear showing of probable cause to believe the suspect committed the crime; fourth, strong reason to believe the suspect is on

the premises; fifth, a likelihood the suspect will escape if not swiftly apprehended; sixth, that although the entry may not be with consent, it must be peaceable.

Lohnes, 344 N.W.2d at 611 (quoting *State v. Lasley* 306 Minn. 224, 232, 236 N.W.2d 604, 609 (1975), *cert. denied*, 429 U.S. 1077 (1977)).

The first *Dorman* factor, the seriousness of the offense, weights in Alayon's favor. Although possession of cocaine is a serious offense, it is not an offense of violence. Second, the officers had no reason to believe Alayon was armed. Third, the state has not made a showing of probable cause to believe there was additional cocaine within the home. However, there was reason to believe Alayon was on the premises, but there is no evidence to indicate he would escape. Last, the officers' entry with drawn guns cannot be characterized as peaceable.

Under the totality of the circumstances, the state's contention that exigent circumstances existed is arbitrary. Zaruba did not pay for the cocaine before receiving it in the first purchase. Additionally, the officers knew neither Espinosa or Jones had returned to the 81 East King area on March 29 after Zaruba paid for the cocaine. The same mode of payment was utilized in the second purchase. Thus, there is no evidence in the record to indicate that Alayon perceived any police participation in the drug purchase. Consequently, there was no reason to search the house without a warrant.

We also note that any exigency which might have existed was created by the officers' own actions. It was the officers' decision not to pay for the cocaine until it was delivered to them, to arrest Espinosa and Jones before they returned to the premises to pay for it and attempt again to observe them. Any exigency created due to Alayon not receiving the drug money was solely due to the officers' tactical decisions.

II.

Police officers testified their plan was to seize the house and apply for a warrant. No application was made, they testified, because consent was volunteered for the search.

"To justify a warrantless search based on voluntary consent, the state must prove the consent was freely and voluntarily given." *State v. Schweich*, 414 N.W.2d 227, 230 (Minn. Ct. App. 1987) (citation omitted). Voluntariness of consent is a finding of fact made by the trial court after considering the totality of the circumstances. *Id.* (citation omitted).

The state argues that Alayon's consent was voluntary, since all the officers' guns were holstered when it was given. This seems disingenuous. We have here an arrest without probable cause, a room full of police officers with drawn guns and not attempt to secure a search warrant — indeed, not even a phone call to see if a judge was available. Under the totality of these circumstances, no issue of consent can arise. See *United States v. Maez*, 872 F.2d 1444, 1455, n. 14 (10th Cir. 1989) (presence of armed SWAT team members with rifles pointed constituted a "frightening scene" and served to invalidate consent to search).

DECISION

The officers conducted a warrantless search of the premises which was not supported either by probable cause or exigent circumstances. Moreover, the search was not conducted after a voluntary consent. The trial court erred in admitting the evidence. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

Reversed.

APPENDIX B

State of Minnesota
In Supreme Court
C5-89-1768

Court of Appeals

Yetka, J.

State of Minnesota, petitioner,
Appellant,

vs.

Filed August 10, 1990
Office Of Appellate Courts

Rolando Thomas Alayon,
Respondent.

SYLLABUS

Police lawfully conducted limited sweep of defendant's house after properly seizing defendant outside open door of house. Police had probable cause to believe house was being used as drug outlet to drug runners, and a sweep to preserve evidence was needed because of high likelihood that people still in house, if left unchecked, would destroy evidence while police were obtaining search warrant. Thereafter, police obtained voluntary consent to search and were, therefore, justified in searching house for the evidence without first obtaining a warrant.

Reversed and judgment of conviction reinstated.

Considered and decided by the court en banc without oral argument.

OPINION

YETKA, Justice.

This appeal raises a number of fourth amendment issues, including when police may make a limited sweep of a residence to preserve evidence pending the issuance of a search warrant and what scope of review is appropriate when an appellate court reviews a trial court's determination that consent to search without a warrant was "voluntary." After considering these issues (and all the issues addressed by the parties in their briefs), we conclude that the court of appeals erred in reversing defendant's convictions of distribution of cocaine, possession of cocaine with intent to distribute and two counts of failure to affix tax stamps. Accordingly, we reverse the decision of the court of appeals and reinstate the judgment of conviction.

On March 29, 1989, Sergeant Francis Zaruba, an undercover narcotics officer with the St. Paul Police Department, met with two men, one of whom was later identified as Robert Laynugh. They went to an alley at the rear of a residence at 1092 East Rose on the East Side. Laynugh went inside and returned with a man later identified as Murl Jones. Jones said his nearby source of cocaine was "out" and that they would have to go to the West Side. He directed them to meet him in 20 minutes at the parking lot at Awada's on Plato, east of Wabasha. When Zaruba and his party arrived at Awada's, they were met by Jones, who was with a second man, in a Ford LTD. Jones told Zaruba that they wanted the money for the cocaine (1/8 of an ounce) "up front." Zaruba refused. Jones said the price would then increase from \$225 to \$250. Zaruba finally agreed to pay \$235. Jones and his passenger, later indentified as Jose Espinoza, then drove off. Other undercover officers who were on surveillance detail followed the LTD to an area about 3/4 to 1 mile away. One of the officers, Carter, saw Espinoza exit the car and walk to a residence on East King. From his vantage point, Carter could only see that Espinoza went into one of

the two houses, either the one at 81 East King or the one at 83 East King. Espinoza returned to the LTD a short time later, and Jones and he drove back to Awada's, where the exchange of cocaine for money took place. Jones gave some of the money to Laynugh and then left with Espinoza.

The next day, March 30, Zaruba called Jones at Awada's and discussed buying an ounce of cocaine for \$1,500. Jones agreed to meet with him in the lot at Plato and Robert that afternoon. Accompanied by Berg, a female undercover officer, Zaruba drove there and pulled up next to Jones and Espinoza, who were in the LTD; Espinoza had a child with him this time. Jones again said that they wanted the money up front, and Zaruba again refused. Jones offered to let Zaruba ride with them to an undisclosed location, but Zaruba said "no". Finally, they agreed that Zaruba could follow them to the area. When they arrived at Stevens, just south of Livingston near East King, Jones again asked for the \$1,500 up front. Zaruba said "no", but gave Jones \$50 up front as a gesture of good faith. Espinoza then walked south on Livingston to King, where he turned left and began walking east. Carter, in his surveillance position, knew that Espinoza entered and exited from either 81 East King or 83 East King. His "best guess" was that Espinoza entered 81 East King, a house with a porch and the front door block by pillars; he felt that, had Espinoza entered 83 East King, he would have seen the unblocked screen door open and close.

When Espinoza returned 5 minutes later, he first got into Jones's car. Then Jones took the cocaine to Zaruba. Zaruba, who was "bugged," gave a prearranged signal, and the surveillance officers moved in and arrested both Jones and Espinoza. After asking Espinoza what his name was, Officer Neil Nelson, an undercover officer, took the \$1,500 in cash and walked to 81 East King, the house which, according to Carter's "best guess," was the one Espinoza had entered to get the cocaine.

When Nelson knocked on the door, he heard a female voice inside the house describe him to someone else. The defendant, Rolando Alayon, who apparently is from Cuba,

came to the door and opened it. Nelson said the "Jose" (Espinoza) had sent him with the money. Defendant frowned and then glanced past Nelson, looking towards the street. Nelson said that he was "in the car when the deal went down" and that Jose had gotten into a fight and asked him to deliver the money. Nelson display the money as he said this. At that point, defendant nodded his head as if saying yes and started coming outside and closing the door behind him.

Convinced at that point that 81 East King was the house Espinoza has entered and that defendant was connected in some way to the sale, Nelson pulled a gun, showed his badge and ordered defendant to lie down on the floor. As defendant lay down on the threshold and other surveillance officers began approaching the house, Nelson entered the house with the intention of securing the premises and preventing the destruction of evidence by those who were in the house, pending application for the issuance of a search warrant. As part of his efforts to secure the house, Nelson ordered the two women who were seated in the living room to stay seated and then made a brief 60-second "sweep" of the house. He found a male teenager also in the house. Nelson and the other officers then put their guns away and let defendant stand up. Neither Nelson nor any of the other officers either handcuffed defendant or told him that he was under arrest.

Nelson talked first to one of the women, Miriam Montanez. He asked her if it was her house and if she paid the rent. She said "yes" to both questions. Nelson asked her if he could search the house. Nelson denied coercing her or threatening her in any way. She not only said that he could search the house, but also assisted him when the search began. Montanez acted as translator when Nelson spoke with her cousin, Luz Cotto, a 20-year-old woman who lived elsewhere in St. Paul and apparently was just visiting.

Before commencing the search, Nelson also spoke with defendant, who, like Montanez, did not need an interpreter. Defendant said that Nelson could search the house, and, when asked if cocaine was in the house, said it was on top of

the cabinet in the kitchen. When Nelson looked inside the cabinet, defendant said, "No, on top."

After finding cocaine there, Nelson gave defendant a *Miranda* warning and arrested defendant. Defendant asked a number of questions about the warning, and Nelson explained it carefully before obtaining a waiver. Defendant told Nelson about his involvement in the offense and pointed out other items in the house related to drug dealing, including a scale and another bag of cocaine, a bag which defendant said that Espinoza had left as collateral because Espinoza had not paid him yet for the ounce sold to Zaruba. Defendant said that he had sold the cocaine to Espinoza for \$600. He said that the scales and cocaine were his, not Montanez's or her cousin's. Police also found a .22 caliber rifle and a clip in the search of the house. In a search of defendant's person incident to the arrest, they found a large amount of cash.

Defendant was charged with distribution of cocaine, possession of cocaine with intent to distribute, and two counts of failure to affix tax stamps. After the trial court denied defendant's motion to suppress on fourth amendment grounds, defendant waived his right to jury trial and agreed to be tried on stipulated facts. The trial court found defendant guilty as charged and sentenced him to concurrent terms of 32 months for distribution of cocaine and 21 months for one of the counts of failure to affix tax stamps. The court of appeals reversed all of defendant's convictions, concluding that the trial court erred in denying the motion to suppress. *State v. Alayon*, 454 N.W.2d 629 (Minn. App. 1990). We reverse the decision of the court of appeals and reinstate the judgment of conviction.

(a) As a starting point, we note that, when Espinoza returned with the cocaine on the 30th, Zaruba was faced with a difficult field decision as to what to do next in his investigation. Obviously, if the police were only after Espinoza, they could have arrested him on the 29th, but they were interested in going one step up the distribution ladder and getting the supplier, for whom Espinoza apparently was working as a runner. They tried to find out

the address of the supplier on the 29th and again on the 30th but were unsuccessful. Carter, who had Espinoza under surveillance, could say only that his "best guess" was that Espinoza entered 81 East King rather than 83 East King to get the drugs. With this information alone, the police probably could not have obtained a warrant to enter and search the residence at 81 East King. The question, therefore, was what to do? One option would have been to give Espinoza the \$1,500 in cash and hope that the police could follow him and learn the precise address. This might or might not have worked. Another option, the one that the police took, was to arrest Espinoza and then, through the ruse used by Nelson, try to determine if Carter's "best guess" was correct.

(b) Nelson, of course, did not need a warrant or probable cause to walk up to defendant's house, knock on the door and say the things he said. Relevant decisions of this court include *State v. Crea*, 305 Minn. 342, 233 N.W.2d 736 (1975) (holding that police without a warrant or probable cause may walk on sidewalk and onto porch of a house — areas of curtilage that are impliedly open to public — and knock on door in an attempt to get suspect to talk voluntarily with them), and *State v. Buchwald*, 293 Minn. 74, 196 N.W.2d 445 (1972) (upholding undercover officer's use of ruse and knocking on door to possible suspect's hotel room).

(c) Defendant did not have to open the door. If defendant had suspected that Nelson was a police officer and had chosen not to open the door, Nelson could not have done anything and defendant, free to act on his suspicions, probably would have disposed of or moved his remaining supply of cocaine to another location shortly thereafter. Defendant freely chose to open the door and stood in the open doorway, which the United States Supreme Court and this court have held to be a "public" place for fourth amendment purposes. *United States v. Santana*, 427 U.S. 38 (1976); *State v. Howard*, 373 N.W.2d 596 (Minn. 1985).

(d) Nelson learned what he needed to know while talking with defendant. Defendant is Hispanic, and so is the "runner," Espinoza. Defendant's responses to Nelson's

statements justified Nelson's belief that defendant was connected to the transaction. While talking with Nelson, defendant looked suspiciously towards the street as if checking out who was in the area. Defendant also nodded his head, as if saying "yes," and started to come out of the house when Nelson displayed the money. We conclude that, at that point, Nelson had probable cause to believe the cocaine has come from this house and that there was more cocaine in the house. See *State v. Bigelow*, 451 N.W.2d 311 (Minn. 1990) (holding that lawful discovery of drugs justifies search which might result in discovery of more drugs or other contraband). Although we need not decide the issue, Nelson may have had probable cause to arrest defendant. If so, he could have arrested defendant in the open doorway without violating *Payton v. New York*, 445 U.S. 573 (1980) (physical entry into the home for purpose of warrantless arrest constitutes violation of individual privacy rights). *State v. Howard*, 373 N.W.2d 596 (Minn. 1985) (defendant standing in open doorway is in public place for fourth amendment purposes). At a minimum, Nelson clearly had articulable suspicion justifying the forced temporary detention of defendant under the *Terry* line of cases. *Terry v. Ohio*, 392 U.S. 1 (1968)¹.

(e) Whether defendant was under arrest or merely being detained at that point, the next question is the same: Could Nelson enter the house without a warrant for the limited purpose of securing the premises and preventing the destruction of evidence by those who were in the house pending application for and issuance of a search warrant? In *Vale v. Louisiana*, 399 U.S. 30 (1970), the police, who had an arrest warrant, arrested the defendant on a narcotics

¹ Nelson did not formally place defendant under arrest at that point and the fact that he pulled out a gun, identified himself and ordered defendant to lie down does not necessarily mean that defendant was under arrest. See, e.g., *State v. Nading*, 320 N.W.2d 82 (Minn. 1982) (ordering suspect to lie on ground did not convert what was intended at that point to be a detention into an arrest), *Johnson v. Morris*, 453 N.W.2d 31, 37 n.10 (Minn. 1990) (approving citation to Model Code of Pre-Arrestment Procedure position that police may use as much force as is reasonable necessary in detention context).

charge outside his house, then entered and made a cursory check of the house to see if anyone was present. When the defendant's mother and brother entered, the police searched the house for and found narcotics. The United States Supreme Court held that the warrantless search of the house was unconstitutional and that the arrest of defendant on the street did not provide its own exigent circumstances so as to justify a warrantless search of the house for drugs. The case is analyzed in detail at 2W. LaFave, *Search and Seizure*, § 6.5(a) (1987) *Vale* might well apply to this case if the police simply had entered the house and had begun searching for drugs immediately. *Vale*, however, does not apply to what the police did here.

The United States Supreme Court's recent decision in *Maryland v. Buie*, 110 S.Ct. 1093 (1990), deals with a quick protective sweep of a house subsequent to an in-house arrest. The Court there held that such a sweep is far different from what is referred to as a "top-to-bottom" search and may be commenced when justified by a reasonable, articulable suspicion, *i.e.*, the *Terry* standard, that the house is harboring a danger to those on the arrest scene. The case dealt with an in-house arrest and did not address the situation posed by an arrest either at the threshold or right outside the house. It also dealt only with a sweep for the purpose of protection of the officer's safety.

The sweep in this case was primarily a sweep for the purpose of rounding up those inside the house who would be aware of the seizure of defendant that occurred just outside the house in their conscious presence, *i.e.*, people who might destroy whatever cocaine and other evidence was in the house while the police were obtaining a search warrant. Fiske, *Clean Sweeps: Protecting Officer Safety and Preventing the Imminent Destruction of Evidence*, 55 U. Chi. L. rev. 684 (1988), contains an excellent analysis of the issue. Fiske takes the position that a higher standard, not the *Terry* standard used in *Maryland v. Buie*, should govern when the sweep is to preserve evidence. Specifically, Fiske argues that the test should be probable cause plus exigent circumstances, that is, probable cause that there is evidence

in the residence and that the evidence is in danger if imminent destruction. *Id.* at 715-19. Fiske argues further that the rule does not automatically foreclose sweeps to preserve evidence when the arrest occurs outside the house. Fiske argues that "where the police have probable cause to believe there is a third party on the premises who knows of the impending or actual arrest, they will have sufficient cause to believe that evidence is threatened with almost certain destruction." *Id.* at 717.

Professor LaFave's thinking appears to be substantially in accord, at least for purposes of deciding this case. See 2 W. LaFave, *Search and Seizure* § 6.5(b) at 665 (new text) (2d ed. 1987 and Supp. 1990). See also *id.* section 6.5(c) at 676 where, interpreting *Segura v. United States*, 468 U.S. 796 (1984), LaFave says:

All members of the Court appear to agree that the mere seizure of the premises and contents (that is, a mere interference with possessory interests) is permissible on probable cause even absent exigent circumstances. *** All members of the Court also appear to accept the proposition that a search (*i.e.* entry) of the premises to facilitate the impoundment requires *both* probable cause and exigent circumstances.

See also *id.* section 6.5(b) at 666, where LaFave states that "there seems to be no basis for limiting warrantless searches to save evidence to cases where the police are already within" the premises.

We need not decide whether a higher standard, not the *Terry* standard used in *Maryland v. Buie*, should govern when the sweep is to preserve evidence. In this case, the police has probable cause to believe that there was evidence in the house and that it was in imminent danger of destruction while they obtained a warrant. Therefore, an impoundment of the house was justified, along with a brief sweep of the house, to prevent destruction of evidence.

(f) This takes us to the court of appeals' conclusion that any exigency which might have existed was created by the police. Obviously, if the police had not arrested Espinoza

and did what they subsequently did, there would have been no exigency; but, as LaFave says, that is not the test. 2 W. LaFave, *Search and Seizure* § 6.5(b) at 662 (2d ed. 1987) We believe that the appropriate test is whether, on the one hand, the exigent circumstances were unnecessarily or deliberately produced by the police or, on the other hand, the exigent circumstances merely were created by the police using what LaFave refers to as "a quite logical investigative technique under the circumstances." *Id.* One can second-guess the conduct of the police in this case in arresting Espinoza when they did, they were "in the field" and had to make a quick decision either to arrest Espinoza or pay him the \$1,500 and let him go. Once they arrested Espinoza, everything else they did falls, in our opinion, under the category of, as LaFave puts it, "quite logical investigative techniques." In short, we believe that this is not the kind of case involving unnecessary or deliberate creation of exigent circumstances.

(g) This brings us to the issue of whether the police were justified in searching the house pursuant to the consent given them by both defendant and Montanez. As *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), held, consent to search need only be voluntary, that is, uncoerced, and need not be knowing or intelligent. The standard is "quite clearly focuses on whether the police behaved coercively." Stuntz, *Waiving Rights in Criminal Procedure*. 75 Va. L. Rev. 761, 787 (1989). Further, as the Supreme Court expressly said in *Schneckloth*, "the question whether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all of the circumstances." 412 U.S. at 227 (emphasis added). The appropriate review standard, therefore, is whether the trial court "clearly erred."

The court of appeals, in its decision, said that the consent was given in "a room full of police officers with drawn guns and not attempt to secure a search warrant — indeed, not even a phone call to see if a judge was available." *State v. Alayon*, 454 N.W.2d 629, 633 (Minn. App. 1990). The latter

point has no relevance to whether the consent was voluntary. The first point, that the guns were drawn, is in disregard of the trial court's express finding that the officers has all put away their guns. (It was a defense witness who testified that the guns were still drawn and that the defendant was wearing handcuffs, but the trial court expressly rejected that witness's testimony and credited the testimony of the police to the contrary.) In fact, the police no longer had their guns drawn; they had let defendant stand up and had not handcuffed defendant or even formally placed him under arrest. Also, the police testified that they did not use any coercion or duress, testimony which the trial court credited. After talking with Montanez and getting her consent, they asked defendant if they could search the house. Defendant not only consented, but cooperated in the search of the house, helping the officers find the cocaine. The trial court found that the consent was voluntary, and we believe that the court of appeals erred in disregarding that determination. See *State v. Hanley*, 363 N.W.2d 735 (Minn. 1985) (upholding trial court's finding of voluntary consent to search even though the officer, although not threatening to get a search warrant, did say that a search warrant could be or would be obtained.)

(h) The search of defendant's person was obviously valid as a search incident to the formal arrest of defendant following the consent search of the house.

(i) The trial court obviously did not err in concluding that the defendant made a knowing, intelligent and voluntary waiver of his *Miranda* rights and that, therefore, the statements he made were admissible.

In summary, our analysis of this case, based on the facts as found and the cases of both the United States Supreme Court and this court, leads us to the conclusion that the Court of appeals erred in reversing the judgment of conviction. Accordingly, we reverse the decision of the court of appeals and reinstate the judgment of conviction.

Reversed and judgment of conviction reinstated.

APPENDIX C

No. C5-89-1768

State of Minnesota
In Supreme Court

State of Minnesota, petitioner,

Appellant,

vs.

Rolando Thomas Alayon,

Respondent.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that respondent's petition for rehearing by, and the same hereby is, denied in all respects.

Dated: September 11, 1990.

BY THE COURT:

Lawrence R. Yetka
Associate Justice

Tomljanovich, J., took no part in the decision or consideration of this matter.